

DECISION



8107 A. Pagny
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20540

FILE: B-193052

DATE: October 20, 1978

MATTER OF: National Guard Bureau --
Request for Advance Decision

DIGEST:

1. Payments to State under Federal contract for telephone services, executed by contracting officer of the United States and obligating annual appropriations of National Guard, are subject to statutory prohibition against advance payments contained in 31 U.S.C. § 529.
2. Advance payment of capital cost of telephone equipment under contract for telephone services with State would be in violation of 31 U.S.C. § 529, even though a State is the recipient, since services to be provided by State are commercial in nature.

By letter dated September 25, 1978, the Chief, National Guard Bureau (NGB), of the Departments of the Army and the Air Force, has requested our decision as to the legality of making certain advance payments for telephone communication services under proposed contracts ("Federal-State Agreements") with various State governments.

NGB has provided the following background information to our Office:

"Typically, the USPFO [United States Property and Fiscal Officer] and the State Adjutant General enter into a Federal-State Agreement for telephone services to be funded by Federal annual Operations and Maintenance funds. * * * Then, pursuant to the Federal-State Agreement, the State enters into a second contract with a telephone company for the phone services. Until recently, the payments to the telephone companies have been on a monthly basis after

the services have been received. However, the telephone companies have developed a new leasing scheme whereby monthly charges may be greatly reduced (typically by 12 per cent) if the State pays the telephone company's (lessor's) entire capital costs for equipment at commencement of the lease. * * *

This leasing arrangement of the telephone equipment is called "tier-pricing", and, as explained in our decision in General Telephone Company of California, 57 Comp. Gen. 89 (1977), 77-2 CPD 376, consists of the following:

"The Tier Pricing concept of rate making essentially divides the total cost of providing service into the categories of capital recovery [basic charge or] Tier A, generally considered fixed costs, and on going operating costs Tier B, such as maintenance and administration which are considered variable."

This leasing method requires the lessee to pay, upon completion of installation of the telephone equipment, a basic charge which represents the entire capital recovery costs for the equipment installed under the lease. The lessee acquires no legal or equitable interest in the title to the equipment, having at most the limited right to physical possession for a period of years. The lessee also has no interest in the residual value of the equipment whether or not services are maintained for the full term of the lease or upon its conclusion.

Relevant provisions of the proposed "Federal-State Agreements" are as follows:

"This Agreement by and between the United States of America hereinafter called the GOVERNMENT, represented by the Contracting Officer executing this Agreement, and the State of _____, hereinafter called the STATE, covering the

telephone communications service at Military Department Complex in said State with the assistance of funds appropriated by the Congress of the United States for the GOVERNMENT contribution to the cost of said service.

Whereas, it has been determined that it would be in the best interest of the GOVERNMENT and the STATE to upgrade and improve the telephone communications system at Military Department Complex to provide a level of service which meets current and foreseeable future requirements;

Whereas, the GOVERNMENT has indicated its intent to pay the cost of the required commercial telephone equipment and facilities; and

Whereas, pursuant to existing GOVERNMENT directives, it is necessary that an Agreement governing joint utilization of the telephone system be entered into before funding assistance may be provided.

NOW, THEREFORE, in consideration of the mutual promises and undertakings of the parties, hereinafter set forth, it is hereby agreed as follows:

ARTICLE 1. The STATE Agrees:

1. To submit to the GOVERNMENT, for review and approval, plans and cost estimates for the installation of a Dimension 400 PBX system complete with all allied equipment and options to meet GOVERNMENT requirements.

2. To contract all work, material, and services required to carry out this Agreement.

3. To contract in accordance with the laws of such STATE, and under those regulations within the Armed Services Procurement Regulation which are applicable to Federally-assisted programs. All such contracts and change orders and contract modifications shall be subject to prior approval by the GOVERNMENT.

4. To permit inspection of the system by representatives of the GOVERNMENT.

5. To supervise and be responsible for the continued provision of service authorized under this Agreement.

6. To furnish certificates and invoices, satisfactory to the GOVERNMENT, for the GOVERNMENT's cost of service as set forth in Appendix "A" of this Agreement.

7. To maintain an accounting system for the total cost of the system acceptable to the GOVERNMENT.

8. The STATE agrees that in return for funds paid to it by the GOVERNMENT, it shall be monetarily accountable and shall reimburse the GOVERNMENT a proportionate share of the funds expended for capital equipment in the event the telephone company fails or refuses to provide the subject services. That is to say, the term of the Agreement years shall be divided into the capital investment and this amount shall be multiplied times the remaining years of the contract term at that time when the telephone company fails or refuses to provide communication services and this amount shall be reimbursed to the FEDERAL GOVERNMENT.

ARTICLE II. The GOVERNMENT Agrees:

1. To contribute Federal funds, subject to the availability of such funds, to support the initial installation of the system, all AUTOVON charges, all recurring and toll charges except those recurring and toll charges incident to Training Site and Service Contract administration and charges of any nature that are funded through Inter Service Support Agreements or funded from other than Federally appropriated funds.

2. To make payment direct to the commercial communications carrier all costs incurred by the State in furnishing such services, supplies and equipment under this agreement. Further, it is the mutual intent of the parties that at that time when the STATE has incurred these costs the Federal grants funds shall be deemed STATE funds subject to STATE laws and regulations pertinent thereto."

Appendix A of the contract contains the "Tier A" capital recovery expenses for the equipment allocable to and payable by the Government.

Advance payments generally are prohibited by the provisions of 31 U.S.C. § 529 (1970), which provides as follows:

"No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. * * *"

As NGB acknowledges, we held in General Telephone Company, supra, specifically with regard to telephone communication service "tier-pricing", that "any leasing scheme which obligates the Government to pay the contractor's entire capital cost at the outset of the lease is contrary to the statutory limitations of 31 U.S.C. § 529."

NGB, however, advances two lines of reasoning to support the conclusion that the "Federal-State Agreements" do not violate the prohibition against advance payments. First, it is argued that the "Federal funds pass to the State and become State funds prior to, or concurrent with, the payments to the telephone company [and thus] State, not Federal law, governs these expenditures". Second, the fact that a State, and not a private contractor, is the recipient of these advance payments in this case is urged as a distinguishing feature.

With regard to NGB's first argument, we stated in 42 Comp. Gen. 631 (1963):

"Article I, section 8, of the United States Constitution confers on the Congress the power to provide for the organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress. In conformity with that authority Congress has enacted laws providing for the supplies necessary to uniform, arm, and equip the National Guard, and has provided funds for that purpose by annual appropriations."

In this case, as there, the moneys so appropriated by Congress are being disbursed by a finance officer of the United States pursuant to Federal statutes and regulations. The purchase by the United States of the telephone communication services from the State, acting through its subcontractor, is to be consummated under a Federal contract executed by a contracting officer of the United States, and payment is to be effected by a check drawn on and paid by the Treasurer of the United States from funds on deposit in the United States Treasury. Such contractual payments by the United States from Federal annual appropriations for National Guard operations and activities are not grants to the State. See 42 Comp. Gen., *supra*. Rather, as the contract is for the use of the United States, obligating appropriated funds of the United States, 31 U.S.C. § 529, by its very terms, is controlling since the "Federal-State Agreements" would bind the United States to an advance of Federal public moneys to a contractor, a State government, for the performance of a service. In view thereof, it cannot be said that the appropriated funds allocated for the operation of the National Guard are not subject to the statutory prohibition against advance of public moneys contained in 31 U.S.C. § 529.

Secondly, NGB questions whether, in view of the fact that a State is the proposed recipient of the advance payments, "is this not an authorized exception to 31 U.S.C. § 529, based on the rationale of the decision in 57 Comp. Gen. 399 (1978) and the prior decisions cited therein?" In that case, we held that advance payments to a State for rental of State-owned land was not in contravention of the prohibition against advance payments in 31 U.S.C. § 529 since a State was the recipient. An examination of that decision, however, along with the others cited therein, reveals that this exception to the prohibition against advance payments has only been invoked where the State was furnishing non-commercial services reasonably available only from the State. 39 Comp. Gen. 285 (1959) (sewer service charge); B-118846, March 29, 1954 (expenses of State Water Commissioner administering Indian irrigation project pursuant to court order); B-109489, July 22, 1952 (repair, operation, and maintenance of roads in conjunction with permanent transfer of Federal roads to County); B-65821, May 29, 1947 (state court fees and other items of expenses required to litigate in State courts in compliance with the requirements of State law); B-36099, August 14, 1943 (lease of State lands); and B-35670, July 19, 1943 (State forest fire prevention and suppression services). We have never applied this exception to situations where the proposed services to be contracted for and provided by a State are generally and commercially available in the marketplace. We do not believe that such an extension of this exception is warranted or justified. If a State, as a contractor, enters the domain of commerce, by proposing to provide services that are freely and readily available in the commercial marketplace, it must also be subject to the same laws governing private providers of such services.

Accordingly, the advance payments may not be made for the leasing of the telephone services in question.



Deputy Comptroller General
of the United States